

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 23RD OCTOBER 2007 / 1ST KARTHIKA 1929

SA.No. 854 of 1994()

AS.28/1989 of SUB COURT, MANJERI
OS.157/1984 of MUNSIFF COURT, MANJERI
.....

APPELLANT/APPELLANT/PLAINTIFF:

PURANGODAN, S/O. VELU,
KUNNATH PURAYIL HOUSE,
PULPATTAM AMSOM,
KOLAMATHIL DESOM,
ERNADU TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI.V.P.REGHURAJ

RESPONDENT/RESPONDENT/DEFENDANT NO.3:

JANAKI W/O. KUNNATH PURAYIL KOPPAN,
PATHIRIYALAKKAL,
PULPARA, OLAMATHIL P.O.,
MONGAM, MALAPPURAM DISTRICT.

BY ADV. SRI.A.P.CHANDRASEKHARAN (SR.)
SMT.PRABHA R.MENON

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 23 /10/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

S.A. NO. 854 OF 1994

Dated this the 23rd day of October, 2007

J U D G M E N T

Plaintiff in O.S. 157/1984 on the file of the Munsiff Court, Manjeri, is the appellant. Respondent is the third defendant in the suit, who was impleaded as additional defendant on the death of the 1st defendant. The name of the 2nd defendant was subsequently struck off. The suit was instituted seeking a decree for permanent prohibitory injunction. Plaint scheduled property is of 36 cents in Resurvey No. 557/3 of Pulpattamsom and olamathil desom in Ernad Taluk. Case of the appellant was that 2 ½ acres of land including the plaint scheduled property was obtained as “Adimavakasam” by the grandfather of the respondent from Jenmi Vilakkattu Illam and plaint scheduled property was set apart as the burial ground and place for family deities. It was kept common and portion of the properties are in the possession of different members of the family and respondent has no right to change the nature of the plaint scheduled property from burial ground and place of deities. Alleging that there was an attempt to do so, appellant sought a decree for permanent prohibitory injunction to restrain respondent from doing so. Respondent in his written statement contended that plaint schedule property was not obtained by the predecessor-in-interest of the appellant as claimed and plaint scheduled

property belongs to Ayyappan and his son Velu, the father of the first defendant and it has been in their possession and subsequently under Ext.B1 the properties were divided and as item No.5, plaint scheduled property was allotted to the share of the first defendant. While first defendant has been in possession of the property, he gifted the property under Ext.B2 in favour of respondent and subsequently respondent decided to sell the property to one Nellikunnathu Choolan and subsequent to the filing of the suit, the property was sold. Appellant is not entitled to the decree sought for.

2. Before the trial court, the Commissioner submitted Exts.C1 and C2 reports and Ext.C3 sketch. Trial court on the evidence of PWs 1 and 2 and Exts. B1 to B2 and DW1 and Exts. C1 to C3 dismissed the suit holding that appellant did not establish that the plaint schedule property was obtained by his predecessor-in-interest or was kept as common property or that respondent has no right over the property. Challenging the decree and judgment, appellant filed A.S 28/1989 before Sub court, Manjeri. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in this appeal.

3. Appeal was admitted formulating the following substantial questions of law.

- (1) Whether courts below were justified in law in omitting to consider the pleadings of the defendant that plaint

scheduled property originally was a Taravad property and the evidence of DW1 to that effect.

(2) When it is proved that plaint scheduled property was Taravad property and it is further proved by Ext.C1 to Ext.C3 that there is a burial ground and a Mandapam, whether appellant is entitled to a decree for injunction as sought for.

4. Learned counsel appearing for the petitioner and the respondent were heard. The argument of learned counsel appearing for appellant is that though first defendant had claimed right under Ext.B1, Ext.B1 does not relate to the plaint schedule property but to some other property and courts below were not justified in non-suiting the appellant relying on Ext.B1. It was also argued that admission of the respondent as DW1 establish that plaint scheduled property belonged to the Taraward of appellant and first defendant and the fact that there is a burial ground establishes the case of appellant that plaint scheduled property was kept common for using it as a burial ground of the Taraward as well as for the deities and in such circumstances, courts below should have granted the decree sought for.

5. Being a suit for permanent prohibitory injunction and that too on the basis that plaint scheduled property was obtained by the predecessor-in-interest of the appellant and was kept as common property of the Taraward being part of 2 ½ acres of properties obtained on Adimavakasham, the burden is definitely on the appellant to prove that the plaint schedule property was obtained as alleged and also that it was

subsequently kept common as a burial ground and that of the deities. Apart from the oral evidence of PW1 no other evidence was adduced to prove that plaint scheduled property was obtained by the predecessor-in-interest of appellant. What was deposed by appellant as PW1, was that the property was obtained by his grandfather and was kept common. He also deposed that his father had obtained patta in respect of the property. But no such patta or any other material was produced to prove that the predecessor-in-interest of the appellant obtained the property as claimed. On the other hand, respondent produced Ext.B1 partition deed which establishes that Item No.5 of the property therein was allotted to first defendant and it was obtained by Aiyyappan and Velu and was subsequently divided under Ext.B1 partition deed. Though it was argued that plaint scheduled property was not covered under Ext.B1, but it relate to some other property, even when appellant was examined as PW1, no such case was spoken to. The only reason for pointing out that the property covered under Ext.B1 is not the plaint scheduled property is that the northern boundary is different. Under Ext.B1 the northern boundary is the property in the possession of Kutty. It has found out by courts below that when examined as PW1, it was admitted that northern boundary of the plaint scheduled property was purchased by appellant from Kutty. If that be so, it cannot be said with reference to the northern boundary that the property covered by Ext.B1 is not the plaint scheduled property. If in fact

when appellant obtained the northern property from Kutty, if it was purchased, we could have found out what was the southern boundary of the property purchased by appellant and whether it was the property kept as common by the family of the appellant as claimed by him or the property covered under Ext.B1 partition deed. It was not produced. In the light of the evidence, it is not possible to hold either that family of the appellant obtained the plaint scheduled property or that it was kept common as a burial ground or mandapam of the family deities. What was argued by the learned counsel was that Ext.C1 to C3 establish that a portion of the plaint scheduled property is a burial ground. True, in Ext.C1 report, which was an ex parte commission as the Commissioner inspected the property without notice to the respondent or first defendant, it was stated that there were traces to suggest that a portion of the property is a burial ground. The said report was remitted back to the Commissioner. Commissioner submitted Ext.C2 report and Ext.C3 sketch. In Ext.C2 report Commissioner had stated that he had originally reported that there was a burial ground on the basis of the representation made by the appellant and by appearance. Commissioner admitted that he did not find out whether there is any reminiscence of the dead bodies buried therein. In such circumstances, it is not possible to hold that a part of the plaint scheduled property is a burial ground. In the light of these evidence, it cannot be said that the finding of the courts below that appellant did not establish that the

plaint scheduled property was kept as a common property of the family for using it as a burial ground or of deities is not correct. Finding of Courts below that appellant is not entitled to the decree sought for is perfectly correct.

There is no merit in the appeal. It is accordingly dismissed.

M.SASIDHARAN NAMBIAR,JUDGE

vps

SA No.854/94

Page numbers